No. 9916.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee-Petitioner.

PETITION FOR REHEARING.

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To the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit:

United States of America, appellee and petitioner herein, respectfully prays that, for the reasons hereinafter set forth, it be granted a rehearing of the decision rendered October 26, 1942. The opinion is by Judge Denman, concurred in by Judge Stephens. There is an opinion by Judge Mathews, dissenting in part from the majority opinion.

Grounds Upon Which Rehearing Is Asked.

This case first came before the Court upon an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, convicting the appellant, Shaw, of causing to be carried through the mails unregistered corporate securities in

violation of the Securities Act of 1933. As to counts Nos. 14 and 15 of the indictment upon which Shaw was convicted, this Court reversed the judgment because the District Court instructed the jury as follows:

> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

This Court took the position in its opinion that the question of the personal ownership of the stock by one McKiver and one Tyler was material to the issue of whether an exemption from registration was available in this case, and that the trial court's ruling to the contrary required a reversal of the judgment below.

Petitioner respectfully submits that this Court erred in so holding, and that the trial court's instruction was proper. Furthermore, in reaching its conclusion and setting forth its holding this Court incorrectly interpreted Sections 2(11), 2(12), 3(a) (10) and 4(1) of the Securities Act of 1933.

We seek in this petition to clarify certain aspects of this case and various provisions of the Securities Act in order to make apparent the correctness of the trial court's instruction and to point out to the Court the erroneous and misleading interpretations given the Act in the Opinion. It is our considered opinion that, if permitted to stand, the decision will constitute a definite invitation for evasion of the registration requirements of the Act, and will seriously jeopardize and hamper effective administration of the Act by the Securities and Exchange Commission in accordance with the mandate of Congress.

I.

The Lower Court Did Not Err in Charging the Jury That it Was Immaterial Under the Federal Securities Act Whether or Not the Stock Sold Was "Personally Owned".

1. Generally speaking, the Securities Act of 1933 requires that all securities offered for sale, sold, or delivered after sale through the mails or in interstate commerce must first be registered with the Securities and Exchange Commission unless an exemption from registration is available. Section 5(a) (2) of the Act, which Shaw was convicted of violating, makes it unlawful, in the absence of an exemption, "for any person, directly or indirectly . . . to carry or cause to be carried through the mails . . . any . . . security for the purpose of sale or for delivery after sale" unless such security is registered with the Commission. Exemptions covering certain classes of securities are set forth in Section 3 of the Act and the exemptions covering certain classes of transactions are contained in Section 4 of the Act. The only exempting provisions which merit any consideration in this case are Sections 3(a) (10) and 4(1). Sections 2(11) and 2(12) merely define and do not exempt. They are important in construing and applying Section 4(1).

2. As stated in the Court's opinion (p. 4), admittedly the burden to show an exemption from registration was upon appellant. There is thus no question but that the lower court was correct in charging that "the burden of showing an exemption from registration, if exemption is claimed, rests on the defendant."

3. This Court has held that the lower court erred in telling the jury that "The fact that the stock sold was

or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

The question whether McKiver or Tyler "personally owned" the stock sold in this case can be material, as this Court has held it to be, only if this question is relevant to the issue whether or not an exemption from registration exists under the facts in this case. But nowhere in the exempting provisions, Sections 3 and 4, or in any other part of the Act (including Section 2(11)) is any exemption given to "personally owned stock" or, indeed, is the phrase mentioned at all. Unless the proof in this case as to "personal ownership" provided a material basis for finding that one of said exemptions was available, there would be no justification for this Court's conclusion that the trial court committed reversible error in its instruction regarding the question of personal ownership of the stock.

This Court, in holding the charge improper, has suggested that the jury might have disbelieved the evidence that Tyler was acting for Shaw or the corporation; and hence, if the jury had been permitted to find personal ownership in Tyler, it could have found that an exemption existed with respect to the stock in question, and acquitted Shaw. But this argument presupposes two things: (1) that there is evidence in the record from which the jury would have been entitled to find that Tyler owned the shares personally, and (2) that such ownership would preclude Tyler from being an "underwriter" within the meaning of Sections 4(1) and 2(11). Neither of these suppositions is valid.

It is clear the record would not have justified a finding by the jury that Tyler owned the shares personally. Rather, the evidence overwhelmingly establishes that Tyler took the stock from McKiver for Shaw's account and for the account of the corporation.

Appellant relies on testimony that some of the stock, which was originaly issued by the corporation to McKiver for his mining claims, was transferred on the books of the corporation from McKiver to Tyler. This testimony came from one Louis R. Jacobson, an accountant, who characterized this stock as "private." This is a mere conclusion. Jacobson also said that certain of the proceeds came from the sale of the "private stock." Obviously, Jacobson was testifying only from the standpoint of proper application of accounting principles [CF. R. 519]. Certainly this evidence of Jacobson provided no substantial basis for a finding that Tyler acquired personal ownership of the stock. Patently, the trial court's instruction could not have been prejudicial to the appellant when the record was so barren of any evidence tending to establish that Tyler "personally owned" the stock, and so replete with evidence that the stock was received by Tyler for appellant Shaw and the corporation.

The second supposition in the opinion is that proof of ownership in Tyler would preclude him from being an "underwriter" within the meaning of Sections 4(1) and 2(11) of the Act. The invalidity of this supposition involves a discussion of this Court's misinterpretations of those sections, and, in order to avoid repetition, will be discussed in the point immediately following.

II.

The Decision Misinterprets and Improperly Applies Sections 4(1) and 2 (11) of the Securities Act.

1. Section 4(1) of the Securities Act provides, in pertinent part, that "The provisions of Section 5 shall not apply to any of the following transactions: (1) Transactions by any person other than an issuer, underwriter, or dealer . . ." As the Court recognized in its opinion, unless Shaw could prove to the satisfaction of the jury that Tyler was not an "underwriter" within the meaning of the Securities Act, there was no possibility of claiming an exemption under the foregoing provision of Section 4(1), for Shaw dominated both Tyler and the corporation and was properly convicted if Tyler was an "underwriter."

Since there is nothing in Section 4(1) indicating an exemption in the case of "personally owned" stock, the only possible source of justification for the view of this Court is Section 2(11) which defines "underwriter." But neither is there reference to personal ownership here. Section 2(11) simply defines an underwriter to be "any person" who (a) "has purchased from an issuer with a view to . . . the distribution of any security"; *or* (b) "sells for an issuer in connection with the distribution of any security"; *or* (c) "participates or has a direct or indirect participation in any such undertaking"; *or* (d) "participates or has a participation in the direct or indirect underwriting of any such undertaking." In addition, the last sentence of Section 2(11) has the effect of broadening the definition of "underwriter" to include a person who purchases from or sells for a person (like Shaw) who controls the issuer.

2. In view of these provisions it is clear that evidence of private ownership does not preclude a finding that appellant and Tyler were underwriters. The evidence* before the jury at the time of the trial court's charge conclusively established that the appellant, Shaw, dominated the corporation and controlled Tyler in these transactions; that the sales in question were part of a wide spread public distribution of stock for the benefit of Shaw and the corporation; that Shaw and Tyler actively participated in this distribution; that Shaw and Tyler were therefore "underwriters" within the meaning of Sections 4(1) and 2(11); and that an exemption from the registration requirements was thus unavailable to the appellant and Tyler.

Most of the proceeds of the sales ultimately went to Shaw. The corporation received a portion of the proceeds. The evidence abundantly establishes that all of the shares, including the stock involved in Counts 14 and 15, were sold for Shaw and the corporation, each being an "issuer" for the purpose of determining whether Tyler was an underwriter. It is respectfully submitted that this evidence conclusively establishes that Tyler, as well as appellant, was a person who, within the meaning of Section 2(11), "sells for an issuer in connection with the distribution of any security"; that each was a person "who participates or has a direct or indirect participation in any such undertaking"; that each was a person who "participates or has a participation in the direct or indirect

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*A summary of the evidence relating to the distribution of stock of the corporation and the participation of Tyler and Shaw in such distribution, is set forth in Appendix "A" hereof.

underwriting of any such undertaking"; and that each was therefore an "underwriter" within the meaning of Sections 4(1) and 2(11) of the Act.

In the face of such overwhelming evidence establishing the fact that Tyler and Shaw were underwriters and that the exemption of the first clause of Section 4(1) was unavailable, the instruction that the factor of personal ownership was immaterial could not, in any event, be prejudicial.

3. The Court misinterpreted and improperly applied Sections 4(1) and 2(11) when it stated in its opinion as follows:

> "In this situation (a) if McKiver acquired personal ownership with no intent to transfer the shares when he acquired them, a subsequent transfer to Tyler would not be a transfer from an underwriter, and Tyler would hold them and sell and mail them other than an underwriter; or (b) if McKiver intended to acquire the shares for the purpose of transferring them, he acquired them as an underwriter, in which situation Tyler did not acquire or hold them as an underwriter and hence sold and sent them through the mails 'other than [as] an underwriter.'
> * * *
>
> "Whether or not Tyler acquired the shares from the corporation, the issuer, through McKiver, its agent, as in situation (c), or from McKiver as personally owning them either freely in situation (a) or as underwriter and hence in situation (b), de-

pends upon whether McKiver personally owned the stock or was merely an agent for an undisclosed principal. The jury might have made the inferences, from the evidence of witnesses believed or disbelieved, supporting any one of the three situations. Only if it made the inference (c) did the question of personal ownership, eliminated by the district court's instruction, become immaterial. The court's instruction prevented the jury from considering the evidence with a view to situations (a) and (b). (Page 5.)

"If the jury had not been improperly instructed that it could not consider either McKiver's or Tyler's personal ownership, they well may have found that the sale and mailing transaction by Tyler was one of his own stock and not a transaction by him as an underwriter of stock passing through him from Shaw as an issuer in the limited sense of section 2(11).

"The instruction respecting the immateriality of personal ownership was error and requires a reversal and a new trial." (Pages 6-7.)

The opinion was incorrect in the following respects:

A. McKiver's intent with reference to transferring the shares and his acquisition of personal ownership are not material in determining whether or not Tyler was an underwriter. It is the intention and position of Tyler in this situation that is determinative. Did Tyler actually sell for the corporation or for Shaw (the issuers under Section 2(11) in connection with the distribution of the security) or did he sell for his own account? That

is the question. Tyler's intent is relevant to this question, but McKiver's is not. It is clear that Tyler could be (and was) an "underwriter" in this situation, even if McKiver originally acquired personal ownership of the stock, and even if McKiver was not an underwriter. Under Section 2(11) a transferee who sells a security may be an underwriter, despite the fact that his transferor, who had originally acquired the security from the issuer, was not an underwriter. This Court therefore erred in holding that the personal ownership and intent of McKiver were material factors.

B. In stating the converse situation, this Court has erred in saying that if McKiver was an underwriter, Tyler could not be. The term "underwriter" is defined in Section 2(11) of the Act to include sub-underwriters, in fact, all persons who participate, directly or indirectly, in the sale of securities for an issuer in connection with the distribution of the security, or who participate in the underwriting of any such undertaking. Section 2(11) defines "underwriter" as "*any* person" who does the things specified in that section. This clearly means any one person or any number of persons, acting separately or in concert. Thus, the mere fact that McKiver might have been an underwriter, would not preclude Tyler from also being an underwriter, and it cannot be properly concluded that a subsequent sale by or through Tyler was "other than [as] an underwriter."

C. In determining whether Tyler was an underwriter under Sections 4(1) and 2(11) of the Act, it is wholly irrelevant and immaterial whether or not he "personally owned" the stock he sold. Proof of personal ownership of the stock in Tyler would not justify a finding that he was not selling the stock for an issuer.

Indeed, in the typical underwriting situation, the underwriter buys and owns, in whole or in part, the stock being offered. So, too, a participant in an underwriting usually sells stock which was initially sold by the issuer to the underwriter and was thus initially owned by such underwriter.

The jury would have been justified in finding Tyler not to be an "underwriter," only if it found that he was not one who "sells for an issuer in connection with the distribution of any security." Whether or not legal title to the shares was transferred to Tyler, he could still have sold for Shaw and the corporation. The question was therefore not one of personal ownership of the stock, but rather of his intent when selling, and of his relationship and understanding, if any, with the issuers in connection with his selling activities. The burden was upon Shaw to prove that Tyler *intended* to sell for his account only. This burden obviously was not met. Rather, the evidence clearly established a contrary intent. Therefore, the charge given by the trial court was correct and did not prejudice appellant.

III.

The Decision Misinterprets and Improperly Applies Section 3 (a) (10) of the Securities Act.

The opinion states that the question of personal ownership of the stock by Tyler was "clearly in issue" with reference to the exemption afforded by Section 3(a) (10) of the Act. This section exempts certain classes of securities from the registration requirements of the Act. The opinion of this Court concludes that a Section 3(a) (10) exemption applied to the stock in McKiver's hands, and that the registration requirements would "reapply only if McKiver transferred them back to the corporation for reissue."

1. In the first place, we submit that this Court incorrectly ruled that the record could substantiate a finding that the requirements of Section 3(a) (10) were met in connection with the issuance of the stock to McKiver. This section permits the exemption only when the securities are issued "after a hearing upon the fairness of the issuance . . ." before an appropriate governmental agency. This Court infers from the existence of a permit issued by the California Corporation Commission that it was issued after a hearing before that Commission. This inference was not permissible. The pertinent provision of the California laws (General Laws of California, Vol. 1, Act 3814, Sec. 4) is divided in two parts. The first paragraph does not require a hearing and, hence, permits the issuance of a permit without a hearing. It is only in the second paragraph dealing with "replacement securities" that there is provision for hearing. Indeed, appellant contended in his opening brief (pp. 2-4) that the permit in question was issued pursuant to the first

paragraph. Consequently, it was not permissible to infer from the mere existence of a permit that there had been a hearing. Moreover, there was no evidence in the record to show that such a hearing was had. In the absence of such a hearing, there could not be any exemption under Section 3(a) (10). Consequently, it was incorrect for this Court to conclude that the stock issued to McKiver was exempt from registration by reason of Section 3(a) (10).

2. Furthermore, this Court incorrectly held that the registration requirements would not apply unless the McKiver stock were returned to the corporation and reissued. As we have shown, the evidence is overwhelming that Tyler sold this stock for Shaw and for the corporation. Obviously, Tyler could do this without having the stock returned to the corporation and reissued. Since he sold the stock for an issuer, he was an underwriter and subject to the registration requirements of the Act. To say that a transferee of stock issued pursuant to a Section 3(a) (10) exemption could sell such unregistered securities for the issuer in connection with a public distribution of the securities would make it a simple matter to evade the registration requirements of the Act. Under this Court's ruling, any promoter desiring to escape the disclosure requirements of the Federal Securities Act could simply obtain a State permit, after hearing, and then proceed to make a general distribution to the investing public. It is submitted that the Act does not permit a construction which would allow such obvious evasion.

Since there is no evidence in the record that would permit a finding that the Section 3(a) (10) exemption applied to the stock when it was issued to McKiver, since

in any event that exemption would not apply to Tyler, and since there is no evidence upon which the jury could have predicated a finding that Tyler was *not* selling for the issuer, the question of personal ownership was immaterial and the trial court's charge was correct and could not possibly have prejudiced appellant.

3. Although it does not appear necessary to the decision, it should be noted that the opinion incorrectly interprets Section 2(12) of the Act. It is stated in the opinion that Tyler could not be a dealer within the meaning of that section, if he was "dealing with his personally owned stock," since such stock would not be issued by another person "as required to constitute him a dealer." Section 2(12) provides:

> "The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person."

Obviously this section defines a dealer in terms of the business that he does, rather than in terms of a particular transaction in securities. Personal ownership does not negative the fact that the stock is issued by another person, *viz.*, the corporation. A person engaged in the business of buying and selling securities very frequently acquires title to the securities. That does not make him any less a dealer in securities issued by another "person," which term is defined to include corporations (Section 2(2)).

Wherefore, appellee, petitioner herein, respectfully submits that its petition for rehearing should be granted.

Respectfully,

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MAURICE NORCOP,
Asst. United States Attorney,
Attorneys for Appellee-Petitioner.

Of Counsel:
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JOHN G. SOBIESKI
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Certificate of Counsel.

I, Leo V. Silverstein, one of the attorneys for appellee and petitioner in the above entitled cause, hereby certify that the foregoing petition for a rehearing is, in my judgment, meritorious and that said petition is presented in good faith and not for purposes of delay.

LEO V. SILVERSTEIN,
Counsel for Appellee.

APPENDIX "A."

Summary of Testimony as to the Distribution of Stock of Consolidated Mines of California and the Participation of Frank S. Tyler and Appellant in Such Distribution.

Tyler was employed by appellant, his brother-in-law, in the fall of 1933 [R. 478]. Thereafter, they prepared or caused to be prepared what was known as the Frank S. Tyler Partnership Agreement, dated February 6, 1934 [R. 482]. Shareholders of Monolith companies were solicited to exchange their Monolith holdings, or to turn in their shares at an agreed valuation, and were later to receive stock in a mining company to be formed. The shareholders of the Monolith companies would sign the Tyler Agreement and deliver their shares, and sometimes cash, to the solicitors [R. 141, 142, 143].

Consolidated Mines of California was incorporated on September 19, 1934 [R. 483]. Its stock was exchanged for Monolith stock and sold for cash, generally at a valuation or price of $2.00 per share [R. 196, 338].

Investor witnesses testified in part as follows:

James Kruse—San Francisco [R. 488-500].

He was first approached by salesman Alexander early in 1934, and a few months thereafter by Tyler. He was solicited by Tyler and appellant and was in communication with them from 1934 until March 8, 1937. He surrendered his Monolith holdings, signing the partnership agreement, and thereafter purchased, for cash, additional Consolidated Mines stock. His investments totaled 1500 shares of stock of Consolidated Mines of California.

Marie M. D. Craig—Fresno County [R. 192-201].

She testified [R. 194], "The following year, early in 1935, Mr. Tyler and Mr. Alexander came to our ranch. * * * I exchanged all my shares of Monolith and Midwest for the gold mining shares. I think it was 806 gold mining shares I got in exchange."

She received a letter [R. 198] dated July 1, 1937, signed by Tyler, advising her of conditions at the mine.

Garfield Voget—Hubbard, Oregon [R. 162-184].

He was called upon by salesman Alexander in 1934 and solicited to surrender his Monolith holdings and to sign the Tyler Partnership Agreement. He thereafter "paid in $200 to the Tyler agreement" [R. 163].

He testified [R. 170],

> "I believe I got a letter from Mr. Tyler to exchange my Midwest stock for Consolidated. Either that or he called me up. I know Mr. Tyler called me up over long distance, and wanted me to exchange, and said that this was about my last opportunity to exchange my Midwest Portland Cement stock for Consolidated Mines. I told Mr. Tyler either that same evening or the next morning that I did not like to be rushed. I answered him by letter. That is my letter."

He received a letter dated July 23, 1935, signed by Tyler, reading in part as follows [R. 176]:

> "I therefore ask that, should you decide to accept this proposition, you immediately wire me at my expense, at 634 South Spring Street, Los Angeles, confirming the fact that you will send your Midwest to me, and I in turn will hold for your account 600 shares of Consolidated Mines."

Tyler called upon him at his home on March 24, 1936 and on March 28, 1936. On the latter date, he agreed to exchange his Monolith stock "for the gold enterprise." He received thereafter stock certificates 691 and 697 of Consolidated Mines of California.

Thomas J. Allen—Corvallis, Oregon [R. 128-134].

Tyler called upon him at Corvallis during the first part of 1936. Tyler solicited him to turn in his Monolith stock upon the "mining stock," representing that such transfer would be to his financial advantage.

He testified [R. 129-130]:

> "He asked for my certificate of deposit of my stock at the bank. I went to my safety deposit box, but couldn't find it. I don't remember whether I ever received a receipt for the deposit of my stock. But I turned it in. He gave me a slip and said that if I was willing to turn my stock into the mining stock, which he thought was best, that he would fix up the form that I would sign which would release my stock at the bank."

Julia Schumacher—Eugene, Oregon [R. 262-264].

On March 16, 1936, Tyler called upon her at her home. He again called upon her in July 1936. In response to his solicitation, she converted her Monolith stock into stock of Consolidated Mines of California.

A. E. Gardner—Porters Grove, Oregon [R. 269-271].

Tyler called on him in March 1936. He testified [R. 269-270]:

> "My wife was with us, and Mr. Tyler. We were given to understand that if we ever got anything out

of our Monolith stock, we would be well to exchange it for stock in this mining company. I had not known Mr. Morgan prior to this conversation, except through correspondence; as he handled the Monolith stock for the Monolith Committee. Mr. Tyler gave us to understand that Mr. Morgan sanctioned this deal and had furnished him with names of the Monolith stockholders that would be allowed to exchange their stock for shares in the mining company."

Salesman *Milton G. Alexander* [R. 134-161] testified he was employed by appellant to solicit funds from Monolith stockholders to conduct litigation against one Burnett; that he worked for appellant from August or September 1932 to December 1935; that toward the end of 1934 he was soliciting Monolith stockholders to execute the Tyler agreement; that he called upon about 2500 Monolith stockholders, taking with him the Tyler agreement; that he contacted about 1000 Monolith shareholders on behalf of the mining enterprise during the period of 18 to 20 months. He testified [R. 148-149]:

"The first trip that I made out in behalf of the gold mining enterprise, I was by myself, later I went out with Mr. Tyler for several months. I would judge I contacted about three or four hundred Monolith stockholders with Mr. Tyler. Before I went out with Mr. Tyler I did have conversations with Mr. Shaw in the Banks-Huntley Building. Various people at various times were present, Mr. Shaw, Mr. Morgan, Mr. Tyler and myself. The conversations just prior to the time Mr. Tyler and I went out on the road took place a considerable amount of time after I went out on the road myself. I went out on the road alone in March of '34, and at that time Mr. Morgan and Mr. Shaw gave me instructions.

> Then when it come time for Mr. Tyler to go out on the road with me, at the beginning of 1935, I was instructed how to handle the situation. I was to go out and contact the stockholders and give them the information of the committee's activities; also what we had done with the Tyler agreement, and then introduce Mr. Tyler to the stockholders and he would carry from there on explaining about the mine, about the activities of the mine. These were stockholders I had contacted before and knew personally, while on the committee, and some also I contacted on the Tyler agreement. I don't recall telling Mrs. Craig that our activities were limited to Monolith stockholders, other than Mr. Tyler and myself making these switches from the Monolith over to the gold mining."

He also testified [R. 151], "When Tyler and I started out on the road, I took a sales kit with me. They were prepared by the office. I imagine either Mr. Morgan or Mr. Shaw prepared them."

He further testified [R. 158]:

> "My recollection is that as we went out and tried to get these stockholders to come into the partnership agreement we also at the same time told them that should we get sufficient funds in, we would incorporate. We got 250 or 300 stockholders into the partnership agreement. Maybe I am way off on it. It seems like it was put into a corporation about the middle of '35."

Charles Wohlberg [R. 184-192] was employed by appellant as a salesman in 1935 and 1936. He testified [R. 186], "Practically all the time when I was in the field, for the mining company, I was with Mr. Tyler."

Further [R. 186-187]:

"The transfers in the main were made through Mr. Tyler. An agreement was signed whereby they agreed to transfer to Mr. Tyler their certificates and he, in turn, accepted that. I don't recall the exact detail, but I believe it stated that he in turn would deliver so many shares of stock, of his personally owned stock of the Consolidated Mines."

Further [R. 187]:

"At these transfers there was no money exchanged for stock through me, as I recall it. I worked in California and I made one trip to Oregon where I effected in this manner some exchanges. In Oregon I called on Mr. Voget who testified here yesterday among others. I went there alone by plane and I met Mr. Tyler there. Before I went to Oregon, conversations were had in Los Angeles with Mr. Morgan and Mr. Shaw in regard to the Oregon trip. That was in 1936."

Further [R. 187]:

"When I speak of 'securities' I mean the stock which Mr. Tyler owned in Consolidated Mines. I was paid by the committee and I also received some compensation from Mr. Tyler. *Mr. Tyler had possession of the stocks.* Mr. Tyler was with me practically all the time when I was making these exchanges."

R. H. Lytle [R. 210-230], an employee at the mine, testified [R. 214-215], "While I was working there Mr. Shaw visited the property once in awhile. *He told me one time that he was trying to raise about $80,000 for development of the property.*"

Paris B. Claypool [R. 288-291], a United States Internal Revenue agent, in 1938 visited appellant's offices and there met, upon numerous occasions, Tyler and appellant. He testified [R. 290]:

> "There was an account in that book that gave a listing of the proceeds received from the sale of Midwest and Monolith stock which had been received from former stockholders of those companies in exchange for Tyler partnership interests or Consolidated Mines interests. I do not recall the terminology of that particular account."

Louis R. Jacobson [R. 271-288, 291-349, 510-521] was employed by appellant as an accountant in October 1934. He testified [R. 274].

> "During the time that I was making entries in this black book, I did not have any occasion to make any entries in there pertaining to the Consolidated Mines of California, a corporation. Consolidated Mines of California, a corporation, after its incorporation did open a bank account. I believe they had but one in Los Angeles. *There was a record shown in the black book where moneys were expended and reflected in the account for and on behalf of the mine up at Calaveras County. Those moneys appeared in the Frank S. Tyler account, and also Edna F. Shaw account.*"

He opened the books of account for Consolidated Mines of California January 1, 1936. A permit was issued by the California Corporation Commissioner dated February 15, 1935. No action was taken under this permit [R. 276, 279]. A second permit was issued July 5, 1935, which authorized the issuance of 300,000 shares to Tyler

to be placed in escrow, and the issuance of 150,000 shares to be issued to Tyler in payment for mining property [R. 279, 281]. A third permit modified the second permit in that 60,000 shares were issued to Tyler and 90,000 shares issued to members of the partnership agreement, rather than the total of 150,000 shares to be issued to Tyler [R. 281-283].

He testified [R. 288]:

> "While I was working up in the offices in Los Angeles in the Banks-Huntley Building and was making records and entries in this black book, the receipts of moneys that were [148] received from the sale of Monolith and Midwest stock were recorded in that book, in the account of Frank S. Tyler. If any sales were made for cash and not for an exchange of stock of Consolidated for Monolith or Midwest, those receipts were reflected in the Frank S. Tyler account. The money received from Miss Pew was recorded in the account of W. J. Shaw, so I would have to correct my former answer to that extent; but my recollection is that it was later transferred over to the Tyler account."

He further testified [R. 293-294]:

> *"As to the receipts entering the Frank S. Tyler account or entering the W. J. Shaw account—there wasn't any great distinction as between the two accounts in so far as the disbursements were concerned, but in so far as receipts of the Tyler agreement and on the subsequent sale of the Consolidated stock of Tyler's stock, with the exception of the Pew sale for $30,000, the sale to her of Consolidated stock, I attempted to keep all such receipts in the Tyler account. That account was in the beginning at the*

head office of the California Bank. Frank S. Tyler and W. J. Shaw could sign checks on that account. I think the checks would show that Tyler signed most of them. I might say that the way Shaw did sign them would be 'Frank S. Tyler by W. J. Shaw.'"

He further testified [R. 293-294]:

"In that Tyler account were deposited the proceeds received from the disposition of Monolith and Midwest shares, in particular, the proceeds that came from the disposition of Monolith and Midwest shares that had been brought in from the shareholders who later acquired interests and exchanges therefor in the Tyler agreement and Consolidated Mines."

He further testified [R. 298]:

"Receipts from sales of Midwest stock or Monolith stock were continuously deposited to the Frank S. Tyler account. That was the principal source of revenue for the Frank S. Tyler account."

* * * * * * * *

"Mr. Alexander was the salesman who went out to solicit the Monolith-Midwest stockholders on the Tyler agreement. I think there was one other whose name I don't recollect, but he made very few deals. I don't know whether Milt Alexander solicited the Midwest stockholders directly on the Tyler agreement. When the Tyler agreement was succeeded by the Consolidated Mines of California, Charley Wohlberg at that time was soliciting the certificate holders, and Mr. Tyler was out with Charley Wohlberg making those solicitations."

Also [R. 305-306]:

"I have made a summary from these books of the total receipts from the sale of stock of the Consoli-

dated Mines of California. It is these two here (indicating). These are Exhibit No. 73. I prepared those. These receipts themselves would be represented by the liquidation of the various other securities that would have been received from both—on the original partnership agreement and then the subsequent sale by Frank S. Tyler of [165] his personally owned stock.

"In 1934 from the Monolith stock which had been received by Frank S. Tyler on the partnership agreement there was obtained the sum of $41,822.69, and the cash that was turned in by the members of the partnership on the Tyler agreement amounted to $5,237.

"The other items represent the sundry receipts of $998.78. The total for that year would be the addition of those three figures—$47,059.69, for the year 1934. In 1935, consideration received from the sale of securities, which securities were received by Tyler on the sale of his personally owned stock, was the sum of $64,971.10."

Also [R. 307-309]:

"Then in addition to the $64,971.10 received by Frank S. Tyler on the sale of securities which he had obtained on the Consolidated Mines stock, there was a sum of $10,797.72 which came in as cash representing purchases of the Consolidated Mines stock. That gives a final total of receipts for the year (1934) of $117,024.15."

* * * * * * * *

"With respect to 1935—Monolith Portland and Midwest Company stock, 28,881 shares, Monolith Portland Cement Company common, 407 shares; Monolith Portland Cement Company preferred, 1627

shares. Cash received from sundry investors, $10,790.72. And then giving the values that I have extended for these stocks, the Midwest was $41,877.45. and the Monolith common was $1,017.50, and the Monolith Portland Cement preferred was $10,574.50.

"And, adding those three together with the sundry or the cash received from sundry sources, makes a grand total of $64,260.17, and this consideration, of course, was received from the sales of Mr. Tyler's personally owned stock and had nothing to do with the original partnership agreement for '34."

Also [R. 312]:

"Proceeds received from these brokers and other sources, after disposition of the stocks, were deposited, practically in all instances in the Frank S. Tyler account. The practice was to deposit them all in the Frank S. Tyler account."

[R. 313-314]:

"When matters of policy were finally determined in respect to the sales activities of the partnership agreement those discussions would be had between W. J. Shaw and Frank S. Tyler. With respect to the sale of Consolidated Mines of California stock, they would have conferences between Tyler and Morgan and the salesmen. They would discuss matters quite generally as between Morgan, for instance, and Tyler would also discuss matters with him. There was never any one particular person. They discussed the matters with Mr. Shaw."

The witness stated [R. 317-318]:

That by document dated July 1, 1935, Tyler assigned to Shaw an 80 per cent interest in all proceeds to be realized from the Tyler partnership agreement and from the net

proceeds to be realized from the sale of capital stock which Tyler was to receive as his 40 per cent interest in the stock of Consolidated Mines of California. This document provided:

> "It is understood that the stock of Consolidated Mines of California, to be issued to me, is to stand on the books of that company, in my name, but I will, on demand, authorize the transfer of said stock to W. J. Shaw or his nominees."

[R. 321]: That the income tax return for Shaw for the calendar year 1935 recited that the consideration received by Shaw from the sale of 44,930 shares of Consolidated Mine Company stock was the equivalent of $63,862.95. The witness testified that the income tax return prepared by him for 1935 for Tyler reflected salaries, wages, commissions. fees, share of profits from sale of stock as received from Shaw in the sum of $8,000; and further testified that such income tax return for the year 1936 showed salaries, wages, commissions, fees received from Shaw in the sum of $8,735.60. He testified [R. 325]:

> "Mr. Tyler's income return here for '36 does not necessarily show income from the Tyler agreement: it shows income from the Consolidated Mines or in accordance with that memorandum agreement which Mr. Tyler signed there giving his 20 per cent interest."

[R. 338]:

> "I recall the occasion when a telephone call was put through from the offices there to Honolulu to a Mrs. Pew. Mr. Shaw conversed with her over the telephone. That was the latter part of '35. Thereafter a transaction was entered into by Mrs. Pew

in which she acquired stock in the Consolidated Mines of California. The investment was 15,000 shares of Consolidated Mines for $30,000. That was not entered in the Tyler account in the black book."

He further testified [R. 339-340]:

"As to this letter of August 7, 1935, signed by W. J. Morgan to Mr. Cline—I recall seeing that letter before or a duplicate of it. There was discussion in the office with regard to the sending out of this particular letter. I believe that discussion was between Mr. Morgan and myself. My recollection is that there was some difference in opinion between Morgan and Mr. Shaw as to some of the wording in this letter, and I know there was quite an argument over it, and there was a slight change made in it. *I do recollect that there was a discussion, particularly with reference to this letter so far as the last paragraph is concerned, with respect to the financing of the property. That reads 'The financing of the mill has been placed in the hands of Mr. Frank S. Tyler who, as secretary-treasurer of the company, is acting as an individual in the financing'*—and, as I say, I don't know whether—Morgan is the one that discussed the matter with [190] me, and I know they had quite a row previously. At the time he came out of Shaw's office, and I think it was Morgan that stated that the word 'financing' shouldn't be included in that letter, that it was not proper because Tyler was not financing the property. My recollection is that the letter was stopped. I don't know how many were mailed."

Also [R. 343-344]:

"As to this certificate of Homer J. and Florence B. [193] Arnold, dated December 14, 1936, No. 732. Certificate No. 732 came from Consolidated

stock of Frank S. Tyler from certificate No. 716. 716 for 4,000 shares to Frank S. Tyler was transferred from Frank S. Tyler from certificate No. 680 for 5,000 shares. That was dated February 15, 1936. Certificate No. 680 for 5,000 shares was issued to Frank S. Tyler and came from certificate 666, 5,000 shares that has been issued to J. R. McKiver. The certificate No. 666 is an original issue; that is as far back as we can go.

"There is certificate No. 679 for 5,000 shares that was issued to Frank S. Tyler on February 15, 1936, and that came from certificate No. 665 for 5,000 shares, which is issued under date of February 15, 1936. There is a stock ledger. 10,000 shares of stock was issued to McKiver, February 15, 1936, under the third permit. I don't know why they gave him 10,000 shares. They had some understanding there, Tyler or Shaw, with Mr. McKiver. He was to receive 10,000 shares. The Woodruff certificate No. 741 is for 30 shares of stock issued to Regina Woodruff on May 13, 1937, and that was transferred from Frank S. Tyler certificate dated August 26, 1937, on certificate No. 716 originally for 4,000 shares. August 26, 1937—that was beyond my time.

"Goodrich, 740, 18 shares, that is the same transaction. It goes back to certificate 716, and then back, and comes from the private stock. And Voget, 691. That goes back to the other McKiver certificate. And Voget's 696 is out of [194] 676 and 679 and goes back to 679, McKiver.

"As to the list of stockholders under certificate No. 3 of the Corporation Commissioner, as to J. R. McKiver and L. D. Gilbert, 20,000—that is the Gilbert who was here testifying that was managing the mine for about three years. The stock books show 10,000 to Gilbert and 10,000 to McKiver."

Also [R. 511]:

"As to Mr. Shaw's private deals, under Monolith stock sold for '34 and '35 and '36, from this statement we can't determine what part of those sales would be represented by any of the considerations turned in on the Tyler original agreement or from the sale of Tyler's personally owned stock."

Also [R. 515]:

"The Corporation Department took exception to the manner in which the stock was issued. That was issued all to [351] Frank S. Tyler, and those individuals out of the original permit. They required that we recall that and issue one certificate directly to Frank S. Tyler for the whole 150,000 shares."

Also [R. 517]:

"The company got the moneys to operate during '36, '37 and '38 from mint receipts and also from advances made by Frank S. Tyler and/or Shaw. Mr. Shaw advanced, according to the records, $35,000 from February 1, 1936, up to the present time."

Sam Green—Los Angeles [R. 385-386].

He was a Los Angeles broker and had an account for Tyler during the years 1935, 1936 and 1937. He testified:

"Mr. Shaw gave me the instructions on buying and selling items that came to me in the for sale in the Frank S. Tyler account."

(*Sic.* Mr. Shaw gave witness instructions concerning the manner in which items comprised in the Frank S. Tyler account should be purchased and sold.)

J. Arthur Hughes [R. 389-398].

From records furnished by Tyler and appellant, he prepared Government Exhibit 94, "Schedule of Cash Receipts and Cash Disbursements of Frank S. Tyler for the Years 1934-1937." This schedule shows that during this four-year period receipts for Consolidated Mines stock sold for cash were $16,834.72, that total receipts during the same period were $273,176.68. Disbursements totalled the same figure. Exhibit 94 also reflects expenditures at the time of $48,611.09 during this period.

This witness also prepared Government Exhibit 95, reflecting the net profit from sales of Monolith stock, Consolidated Mines stock sold for cash and cash taken in on the Tyler agreement during 1934-1937, and reflecting total receipts of $146,605.07, total disbursements of $73,-802.90, with a net profit therefrom of $72,802.17 to Tyler and appellant.

Appellant William J. Shaw [R. 521-551] testified [R. 546]:

> "As to my income tax return of 1936, Exhibit No. 38, I see it. I see the last item is—amount paid to Frank S. Tyler as share of profit on sale of Consolidated Mines stock, total consideration received therefor $43,838.05, Frank S. Tyler receiving 20 percent thereof in accordance with agreement and that Tyler's 20 percent is set out as $8,735.60. Is that all charged up—giving Morgan that here, $8,000? He got a whole lot more than that in the year of 1936. I signed this return."

He further testified [R. 551]:

> "The Consolidated Mines Company does not owe me any money now. That $37,000 I charged that off. I gave it to them. I said, 'Never charge any money to me.' They could have it."